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No. 88-155

In The

Supreme Court of the United States

October Term, 1988

THE STATE OF TEXAS,

Petitioner,

vs.

GREGORY LEE JOHNSON,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

I. SECTION 42.09(a)(3) DOES NOT PROHIBIT CONDUCT ON THE BASIS OF COMMUNICATIVE IMPACT 1

II. SECTION 42.09(a)(3) IS "VIEWPOINT NEUTRAL" 5

III. SECTION 42.09(a)(3) IS NOT UNCONSTITUTIONALLY VAGUE 6

IV. SECTION 42.09(a)(3) IS NOT UNCONSTITUTIONALLY OVERBROAD 13

V. SECTION 42.09(a)(3) IS DESIGNED TO REACH ONLY ACTIONS THAT PHYSICALLY DAMAGE OR DESTROY THE FLAG AND WHICH ARE, BY THEIR VERY NATURE, VIOLENT 14

VI. SECTION 42.09(a)(3) DOES NOT PERMIT CONVICTION BASED UPON WORDS OR ASSOCIATIONS 15

CONCLUSION 17

INDEX OF AUTHORITIES

Page

CASES

Chance v. State, 563 S.W.2d 812 (Tex. Crim. App. 1978) 12

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 8

Coates v. Cincinnati, 402 U.S. 611 (1971) 10

Floyd v. State, 575 S.W.2d 21 (Tex. Crim. App. 1978) 8

Holmes v. Wallace, 407 F.Supp. 493 (M.D. Ala.), *aff'd*, 540 F.2d 1083 (5th Cir. 1976) 13

Lapolla v. Dullaghan, 63 Misc.2d 157, 311 N.Y.S.2d 435 (N.Y. Sup. Ct. 1979) 13

N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982) 14

New York State Club Ass'n. v. City of New York, ___ U.S. ___, 108 S.Ct. 2225 (1988) 7

Parker v. Morgan, 322 F.Supp. 585 (W.D.N.C. 1971) 6

Smith v. Goguen, 415 U.S. 566 (1974) 3, 11, 12, 17

State of Delaware ex rel. Trader v. Hodsdon, 265 F.Supp. 308 (D.C. Del. 1967) 13

Street v. New York, 394 U.S. 576 (1969) 15

Thornhill v. Alabama, 310 U.S. 88 (1940) 8

Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982) 8

INDEX OF AUTHORITIES–Continued

Page

STATUTES

36 U.S.C. § 174 13

36 U.S.C. § 175 13

36 U.S.C. § 176(K) 5

36 U.S.C. § 177 13

TEX. GOV'T CODE ANN. § 312.002 (Vernon 1988) 8

TEX. PENAL CODE ANN. § 6.03 (Vernon 1974) 12

TEX. PENAL CODE ANN. § 7.01 (Vernon 1974) 17

TEX. PENAL CODE ANN. § 7.02 (Vernon 1974) 17

TEX. PENAL CODE ANN. § 42.09 (Vernon 1974) ...*passim*

OTHERS

Black's Law Dictionary 1602 (4th ed. 1968) 6

Webster's New Collegiate Dictionary 243 (1980) 11

Webster's New Collegiate Dictionary 293 (1980) 9

Webster's New Collegiate Dictionary 304 (1980) 14

Webster's New Collegiate Dictionary 730 (1980) 8

Webster's New Collegiate Dictionary 859 (1980) 8

Webster's New Collegiate Dictionary 1051 (1980) 9

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COMES NOW THE STATE OF TEXAS, Petitioner, and respectfully submits this brief in reply to the brief of Respondent, Gregory Lee Johnson.

I. SECTION 42.09(a)(3) DOES NOT PROHIBIT CONDUCT ON THE BASIS OF COMMUNICATIVE IMPACT

The primary thrust of Respondent's argument is that § 42.09(a)(3) "singles out for prohibition only such conduct as will have a 'seriously offen[sive]' communicative

impact on others."[1] Resp. Br. 10. Johnson argues that "[b]ecause the flag carries such a powerful symbolic meaning, almost any conduct with regard to it is communicative." Resp. Br. 32. Johnson also claims that "flagburning . . . provides a powerful medium for the message of dissent from government policies or disrespect for the government itself." *Id.* These arguments assume that an individual who abuses a flag is always "saying something" by virtue of that abuse. The arguments also assume not only that all acts of flagburning are disrespectful and constitute a means of dissent, but that the disrespect/dissent is directed at the government itself, and not at some other entity.[2] These assumptions have no basis in fact.

Johnson's arguments also constitute a gross mischaracterization of the statute. The focus of the Texas statute is on a particular act and the accompanying *mens rea*. The statute is essentially designed to protect the physical integrity of the flag. The Texas statute does not single out conduct that expresses an anti-government

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[1] Johnson's argument that one must "foresee what will 'seriously offend' not merely all potential passers-by, but also all who might 'discover' his action later through word of mouth, the news media, or a photograph," Resp. Br. 25, completely misconstrues the statute, which clearly relates only to actual discovery as opposed to reported discovery.

[2] This is an interesting argument in view of the fact that Johnson's own trial exhibits were directed largely at the policies of certain American corporations and not at the "government" per se. (R.V-833; Def. Ex. 1).

message. Section 42.09 does not regulate the content of the message, if any, sought to be conveyed; rather, the statute regulates conduct and the manner in which the conduct is effectuated. *See* Pet. Br. 44.

In this regard, the crime does not turn on the reaction, if any, of those who view an act of flag desecration, but on an intentional act of severe, flagrant physical abuse of the flag. The statute, by its terms, is not concerned with any expression which may accompany the act of flag desecration. Thus, the State's proscription is not limited to those acts of desecration which communicate unacceptable ideas about the flag. The statute does not punish only those who desecrate the flag "for the purpose of disparaging it as a symbol," but also those who would *not* necessarily desecrate the flag with that motive or purpose. *See Smith v. Goguen*, 415 U.S. 566,598-599 (1974) (Rehnquist, J., dissenting).

The First Amendment was never intended to extend to physical acts of destruction involving the American flag. The fact that an individual may intend an act of flag desecration to convey a message, even a particularized message, is insufficient to cloak the act with First Amendment protection. An individual "leaves the arena of speech" and crosses the line into unprotected conduct when he engages in an act of wanton destruction.

Moreover, the statute can be read so that the "serious offense" language is applicable only to that portion of the definition of desecrate which modifies the term "physically mistreat." Indeed, the very placement of the commas may well indicate that the legislature intended that the terms "deface" and "damage" stand alone without any

further clarification. Read in this way, the "serious offense" language becomes pertinent only in a marginal case where it is questionable whether an act of physical mistreatment of the flag is serious enough to constitute desecration.

The Texas Court of Criminal Appeals did not specifically interpret the meaning of the definition of "desecrate," nor did it decide the relationship of the definition to the remainder of the statute. More importantly, the court did *not* find that the language rendered the statute "essentially communicative" or proscribed penalties for expressive impact alone. The court held only that the language was too broad to justify the statute as a breach of the peace statute.[3]

In the alternative, if this Court deems that § 42.09(a)(3) does regulate expressive conduct or conduct with communicative impact, the State has nonetheless elaborated two compelling interests that justify regulating that conduct. These interests – preserving the flag as a symbol of nationhood and national unity *and* preventing a breach of the peace – have been discussed in depth

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[3] The Court of Criminal Appeals found this clause overbroad only as a breach of the peace statute, reasoning that serious offense would not always result in a breach of the peace. Pet. App. 13. Even if this erroneous legal conclusion is binding upon this Court, it does not void the statute. The Texas court did not address the overbreadth question vis-a-vis the nationhood and national unity interest, nor did it address overbreadth in the context of the First Amendment. The Court of Criminal Appeals found only that the statute could not be applied to Johnson as a breach of the peace statute since no actual violence occurred. *Id.*

in the State's brief on the merits. Pet. Br. 19-37. Those interests and the State's discussion of those interests have been all but ignored by Respondent. Texas' interests are sufficient to justify whatever minimal infringement of speech may ensue from enforcement of the statute.

II. SECTION 42.09(a)(3) IS "VIEWPOINT NEUTRAL"

Johnson claims that the statute is "viewpoint based," in that it "favors the State's viewpoint that the flag is a 'symbol of nationhood and national unity' at the expense of all other views." Resp. Br. 13. Johnson states that "[t]hose who seek to celebrate the viewpoint sanctioned by the State, however, may burn the flag, so long as they do so ceremoniously." *Id.* This is simply not the case.

Section 42.09(a)(3) does not permit impairment of the flag's physical integrity by those who do not seek to disparage it as a symbol or by those who seek to "praise" the flag or this country. Texas prohibits flagburning *regardless* of the message, if any, sought to be conveyed by the conduct. A flagburning is a flagburning; a flagburning as a "contra memorial" is as illegal as a "contra protest." *Cf. Amici* Br. ACLU 14-15. A flagburning to "demonstrate respect for the symbol," Resp. Br. 14, does not decriminalize the conduct.

In propounding his claim that Texas would allow a flag to be destroyed to show patriotism or to make some affirmation of faith to the nation, Johnson refers to 36 U.S.C. § 176(K). While that statute does provide that the "proper" way to dispose of a flag is to burn it in a dignified way, this refers only to the retirement from

service of a flag too worn to be displayed, not to the act of burning a flag to proclaim a patriotic stance.

For many, the flag may be the ultimate symbol of patriotism. For others, it may symbolize a nation unresponsive or even oppressive. Still others may view the flag with no discernable emotion at all. Texas regulates none of these viewpoints. Texas only commands all within its borders and subject to its jurisdiction to refrain from desecrating the flag.[4] The statute demands only that the flag be left alone, physically unimpaired.[5]

III. SECTION 42.09(a)(3) IS NOT UNCONSTITUTIONALLY VAGUE

In his brief, Johnson has reiterated the vagueness challenges raised in the Texas courts. He claims that the statute is vague because it "fails to draw a comprehensible line between those acts of flagburning it prohibits and those it permits." Resp. Br. 24. Johnson's argument focuses primarily on § 42.09(b) which defines "desecrate" as meaning, in part, to "physically mistreat" in a way that the actor knows will "seriously offend" one or more

[4] Texas agrees that the United States flag is "sui generis." *Parker v. Morgan*, 322 F.Supp. 585,588 (W.D.N.C. 1971); *Amici* Br. for W.L.F. 11. The flag is "of its own kind or class." *Black's Law Dictionary* 1602 (4th ed. 1968). It is unique, a special entity whose ownership carries with it special responsibilities.

[5] The applicability of § 42.09 to the desecration of other objects should help clarify this fact. The statute does not permit "ceremonial" damage to a tombstone or "dignified" defacement of the Alamo.

persons likely to observe or discover his action. Assuming, without conceding, that Johnson is entitled to present this argument,[6] § 42.09(a)(3) is not unconstitutionally vague.

Recently, in *New York State Club Ass'n. v. City of New York*, ___ U.S. ___, 108 S.Ct. 2225, 2233 (1988), this Court reiterated the general rule that a facial challenge is proper under the First Amendment only when the challenged law could *never* be applied in a valid manner or when, even though a law may be validly applied to defendant, it is so broad that it may inhibit the constitutionally protected free speech of third parties:

> Properly understood, the latter kind of facial challenge is an exception to ordinary standing requirements, and is justified only by the recognition that free expression may be inhibited almost as easily by the potential or threatened use of power as by the actual exercise of that power. Both exceptions, however, are narrow ones: the first kind of facial challenge will not succeed unless the court finds that "every application of the statute created an impermissible risk of suppression of ideas," and the second kind of facial challenge will not succeed unless the statute is "substantially" overbroad, which requires the court to find "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court."

[6] The intermediate court of appeals found nothing vague about the terms of the statute. J.A. 20. The Court of Criminal Appeals, which had granted Johnson's petition for discretionary review on this point, specifically declined to address this issue. Pet. App. 2,4,21. This argument, if successful, would substantially alter the judgment by determining that the statute is unconstitutional on its face. This issue should have been raised, if at all, in a cross-petition for certiorari.

(Citations omitted). *See also City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789,797-798 (1984), citing *Thornhill v. Alabama*, 310 U.S. 88 (1940). In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. A court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, uphold the challenge only if the enactment is impermissibly vague in all of its applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489,494-495 (1982).

Under Texas law, a statute is not rendered vague merely because the words or terms used are not defined. Even a statute which appears vague may be given constitutional clarity when aided by standard rules of statutory construction. One such rule is that terms not defined in a statute are given their ordinary meaning. TEX. GOV'T CODE ANN. § 312.002 (Vernon 1988). Words defined in dictionaries and with meanings so well known as to be understood by a person of ordinary intelligence are not considered vague or indefinite. *Floyd v. State*, 575 S.W.2d 21,23 (Tex. Crim. App. 1978).

Johnson first attacks the term "physically mistreat" as vague. Surely, the word "physically" is understandable. *See Webster's New Collegiate Dictionary* 859 (1980) which defines "physical" as "having material existence." "Mistreat," too, is readily capable of definition. *See Webster's New Collegiate Dictionary* 730 (1980) which defines

"mistreat" as "to treat badly: abuse."[7] There is no question in this case but that Johnson "abused" the "material existence" of the flag by burning it.

The term "seriously offend" is also readily understandable. "Seriously" has been defined as "to a serious extent; severely." *Webster's New Collegiate Dictionary* 1051 (1980). "Serious" is defined, in relevant part, as "deeply interested" and "having important or dangerous possible consequences." *Id.* at 1050. "Offend" is defined, in part, as "to cause dislike, anger, or vexation," "to cause to feel vexation or resentment usu[ally] by violation of what is proper or fitting." *Id.* at 790. Thus, an individual is guilty under this portion of the statute if he "abuses" the "material existence" of the flag in a way that he knows might produce a reaction of resentment or anger with possible dangerous consequences.

A fair reading of § 42.09(a)(3) reveals that the Texas statute regulates conduct which significantly impairs the physical integrity of the flag and no more. A reasonable person of common intelligence is placed on sufficient

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[7] The terms "deface" and "damage," which are also part of the statutory definition of desecrate, are also well-defined terms. *See Webster's New Collegiate Dictionary* 293 (1980) ("deface" is defined as "to mar the external appearance . . . injure by effacing significant details") and 284 ("damage" is defined in part as "loss or harm resulting from injury to . . . property"). A flag is unquestionably damaged when burned. Johnson was specifically charged by information with damaging *and* physically mistreating the flag by burning it. I.A. 3. The jury had to specifically find that burning the flag constituted "damage" *or* "physical mistreatment" in order to return a conviction. (R.I-50).

notice of what the statute forbids. Certainly any individual of common intelligence would have no difficulty in discerning that the act of soaking an American flag with lighter fluid and igniting it constitutes desecration.

Contrary to Johnson's assertions, application of the statute does not depend upon or vary with the sensibilities of persons likely to observe the conduct. The definition of "desecrate" modifies the culpable mental state. The statute does not proscribe reckless or negligent handling of the flag, only intentional and knowing abuse – the kind of mistreatment that the actor knows is not innocent but is intentional and designed to seriously offend. A relatively casual touching or mishandling of the flag, such as wadding it up and tucking it under a tee shirt, which might "offend" the sensibilities of some persons, is not within the reach of this statute. Instead, Section 42.09 punishes only conduct which constitutes severe physical abuse of the flag which an individual knows is likely to seriously offend potential observers. The statute is invoked only when an individual commits flagrant abuse of the flag.

Section 42.09(a) (3) differs significantly from the statute condemned in *Coates v. Cincinnati*, 402 U.S. 611 (1971). At issue in *Coates* was a municipal ordinance making it a criminal offense for three or more persons to assemble on any sidewalk and there conduct themselves in a manner annoying to persons passing by. *Id.* at 612 n. 1. This Court found that the statute was vague[8] because "no standard

[8] The dissent by Justice White found the statute was not vague as "[a]ny man of average comprehension should know that some kinds of conduct, such as assault or blocking passage on the street, will annoy others and are clearly covered by the 'annoying conduct' standard of the ordinance." 402 U.S. at 618.

of conduct is specified at all." *Id.* at 614. Section 42.09 is quite different from the ordinance in *Coates*. Section 42.09(a)(3) clearly specifies the offensive conduct contemplated by use of the term "desecrate" – deface, damage or physically mistreat. This is a definite standard of conduct. Individuals of common intelligence need not guess at the meaning of this statute.

Smith v. Goguen, 415 U.S. 566 (1974), is also distinguishable. That case involved a Massachusetts flag misuse statute which made it an offense to "treat contemptuously"[9] the United States flag. *Id.* at 570,571. A majority of this Court concluded that this language was impermissibly vague[10] on its face, holding that it supplied

[9] *Treating* a flag "contemptuously" is different from *physically mistreating* a flag in a way that the actor knows will seriously offend others. "Contemptuously," by its very nature, means "manifesting, feeling, or expressing contempt," which is defined as "lack of respect or reverence for something." *Webster's New Collegiate Dictionary* 242-243 (1980). "Treats contemptuously" is thus an act which, by its very nature, must express a lack of respect. *See Goguen*, 415 U.S. at 588 (White, J., concurring).

[10] Justice White, concurring in the judgment, found that the statute was not vague, but was, in fact, capable of understanding by "anyone with at least a semblance of common sense." 415 U.S. at 584. Justice White also found that the statute was not vague as to Goguen because he was "under no misapprehension as to what he was doing" and because "[i]t should not be beyond the reasonable comprehension of anyone who would conform his conduct to the law to realize that sewing a flag on the seat of his pants is contemptuous of the flag." *Id.* at 584-585. Those justices who dissented agreed that the statute was not vague. *Id.* at 590 (Blackmun, J., dissenting). *Id.* at 591 (Rehnquist, dissenting). Both dissents were joined by then Chief Justice Burger.

no standard. This Court reasoned that the statute, which had received no narrowing state court interpretation, failed to draw reasonably clear lines between the kinds of nonceremonial treatment of the flag that it criminalized and those that it did not.[11] *Id.* at 574.

Unlike *Goguen*, the Texas statute establishes a definite standard of conduct. Section 42.09(a)(3) clearly defines what type of conduct constitutes desecration, *i.e.*, defacement, damage or physical mistreatment. If the complained-of "serious offense" language modifies the entire definition, it goes to the culpable mental state of the individual at the time he engaged in the proscribed conduct and to the manner in which that conduct is performed. The mental element of "knows"[12] narrows the

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[11] Goguen's act was wearing a small flag sewn to the seat of his pants. There was no allegation or evidence of physical desecration. The opinion characterized Goguen's conduct as "immaturity," "silly conduct," "casual treatment of the flag" and "informal use of the flag," 415 U.S. at 573,574, all vastly different matters from soaking a flag with lighter fluid and igniting it.

[12] Under Texas law, a person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist; a person acts knowingly, or with knowledge, with respect to a result of his conduct *when he is aware that his conduct is reasonably certain to cause the result*. TEX. PENAL CODE ANN. § 6.03(b) (Vernon 1974). The Texas Court of Criminal Appeals has acknowledged that "knowingly" has acquired a technical meaning not necessarily equivalent to the common, everyday usage of such word. *See Chance v. State*, 563 S.W.2d 812,815-816 (Tex. Crim. App. 1978). By burning the flag in the manner he did, Johnson was aware that his conduct was reasonably certain to cause serious offense.

statute to reach only intentional acts.[13] No actual serious offense need occur in order for the statute to be violated.[14] The statute is not inherently subjective.

On its face, § 42.09(a)(3) does not foreclose any individual from exercising his right to free speech. Nor does it prohibit any individual from using the flag or displaying the flag in informal ways to express his opinions. What is prohibited are clear, severe and flagrant acts of flag desecration.

IV. SECTION 42.09(a)(3) IS NOT UNCONSTITUTIONALLY OVERBROAD

In part, Johnson's overbreadth argument is premised on the incorrect assumption that the statute regulates "use," "display" and "misuse of the flag." Resp. Br. 24. To support this argument, Johnson sets forth a "laundry list" of conduct, based on the Flag Code, 36 U.S.C. §§ 174-177, which he claims the Texas statute would prohibit. Resp. Br. 28-29.

The federal Flag Code is directory in nature, not mandatory,[15] as use of the word "should" throughout

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[13] This mental element was absent from *Coates*.

[14] Thus, Johnson's argument that the "legal observers" were merely offended, as opposed to seriously offended, is beside the point.

[15] The federal Flag Code is not intended to proscribe behavior but is fashioned as an expression of prevalent custom and usage regarding display of the American flag. *Lapoila v. Dullaghan*, 63 Misc.2d 157, 311 N.Y.S.2d 435,438 (N.Y. Sup. Ct. 1979); *see also Holmes v. Wallace*, 407 F.Supp. 493, 496 (M.D. Ala.), aff'd, 540 F.2d 1083 (5th Cir. 1976); *State of Delaware ex rel. Trader v. Hodsdon*, 265 F.Supp. 308, 310 (D. Del. 1967).

those provisions clearly indicates. The Flag Code merely sets forth proper etiquette in dealing with the flag. No penalties, civil or criminal, apply to violations of its terms. Moreover, the customs discussed in the Flag Code relate to use and display of the flag, not to its desecration.

Section 42.09(a)(3) does not proscribe misuse or improper display of the flag; rather, it prohibits desecration of the flag. By defining "desecrate"[16] as "deface," "damage" or otherwise "physically mistreat" in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action, § 42.09(b) clearly proscribes only flagrant acts of physical abuse or destruction. The statute is not designed to regulate any of the examples suggested by Respondent.

V. SECTION 42.09(a)(3) IS DESIGNED TO REACH ONLY ACTIONS THAT PHYSICALLY DAMAGE OR DESTROY THE FLAG AND WHICH ARE, BY THEIR VERY NATURE, VIOLENT

Johnson insists that he "peacefully" burned the flag. Resp. Br. 1, 3, 8, 30. The apparent thrust of this argument is that he cannot be punished for flag desecration because no actual violence occurred.

The State fails to see how a wanton act of flagburning can be characterized as "peaceful;" by its very nature, the act is violent. Violence[17] was unquestionably done to the flag. Certainly Johnson has no claim that his act was

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[16] *See also Webster's New Collegiate Dictionary* 304 (1980).

[17] The First Amendment does not protect acts of violence. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886,916 (1982).

peaceful. Johnson burned the flag in a public place at the climax of a turbulent, destructive and potentially violent demonstration in the midst of a crowd of demonstrators and onlookers. Considering the surrounding demonstration and the intensely public place in which the act occurred, it can hardly be characterized as anything but "inherently inflammatory," literally, as well as figuratively. While it is true that no actual violence among persons occurred, this was merely fortuitous. It was the *response* of those who witnessed the act that was peaceful; the *act itself* was not. The fact that the *response* of those who witnessed the act was peaceful does not render the *act* peaceful.

In the case at bar, Johnson soaked the flag with lighter fluid and ignited it in the midst of a crowd of persons in an undisputedly public place. The flag was totally consumed. This is exactly the sort of violent conduct prohibited by the terms of § 42.09(a)(3).

VI. SECTION 42.09(a)(b) DOES NOT PERMIT CONVICTION BASED UPON WORDS OR ASSOCIATIONS

As Johnson acknowledges, nothing in the terms of § 42.09(a)(3) permits a conviction based upon words.[18] Resp. Br. 33-34. Likewise, nothing in the trial court's charge to the jury authorized conviction for any words

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[18] This is a crucial distinction from the statute condemned in *Street v. New York*, 394 U.S. 576 (1969), which prohibited speaking defiant or contemptuous words about the flag.

spoken.[19] (R.I-47-51). Johnson was prosecuted and convicted for an act of flag desecration, not for using foul language, engaging in contemptuous speech, or making disparaging remarks about the flag.[20]

While the trial prosecutor did, in final jury arguments, refer to Johnson's words and extraneous conduct throughout the course of the demonstration, all such evidence was intended to show the destructive, turbulent and potentially violent atmosphere in which the flagburning occurred. This was recognized by the intermediate court of appeals. J.A. 25.

It should also be noted that Johnson's defense[21] at trial was that he was not the flagburner. Texas permits criminal responsibility to be placed on one who, acting

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[19] In keeping with the instructions given by the trial court (R.I-47-51), the jury could not have returned a verdict of guilty based solely upon Johnson's "words and associations." Resp. Br. 33-34. To have rendered such a verdict could have constituted jury misconduct, a point not raised by Johnson either in Motion for New Trial or on direct appeal.

[20] In fact, Johnson's protestations that he was convicted because of his many and harsh words against this country and because of his associations with his fellow protesters evidences the significant alternative avenues of communication that the State of Texas *did* allow.

[21] Johnson did not testify in his own behalf at the guilt/innocence stage of the trial; all defensive evidence was presented by witnesses who had been observers of the demonstrations for the ACLU, an interesting coincidence since ACLU attorneys represented Johnson at trial and through the state appellate process and have appeared as *amici* on his behalf in this Court.

with the intent to promote or assist the commission of the offense, "solicits, encourages, directs, aids, or attempts to aid" another in the commission of the offense. TEX. PENAL CODE ANN. §§ 7.01,7.02 (Vernon 1974). The jury was charged under the law of parties. (R.I-49). This instruction was submitted without objection.[22] A "converse" charge was also submitted at Johnson's request. (R.I-49; R.V-629). Thus, it was incumbent upon the trial prosecutor to argue in favor of any theory under which Johnson could be found guilty. The fact that one may be guilty as a party to a violation of § 42.09 does not render the statute a prohibition on association.

CONCLUSION

Section 42.09 reflects the Texas legislature's attempt to define "with substantial specificity what constitutes forbidden treatment" of the flag. *See Smith v. Goguen*, 415 U.S. at 581-582. The statute is aimed at severe, flagrant and provocative acts of physical abuse and destruction of the flag, the symbol of this nation. Moreover, § 42.09(a)(3) proscribes only acts done in a public context which, by their very nature, are likely to create a breach of the peace. The language utilized by the statute – desecrate, deface, damage, physically mistreat – contemplates violent acts which are clearly intentional and malicious.

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[22] Error was, nevertheless, raised on this point on direct appeal. The intermediate court of appeals found no error, primarily because "the bulk of the State's argument was premised on Johnson's culpability as a sole actor." J.A. 24.

The Texas Court of Criminal Appeals erred in concluding that this statute violated the federal guarantee of freedom of speech as applied to Johnson. For the foregoing reasons, in addition to those urged in its brief on the merits, the State requests that the judgment of the Texas Court of Criminal Appeals be, in all respects, reversed.

Respectfully submitted,

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